82-119

Office - Supreme Court, U.S.
FILED
JUL 21 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

No.

AMERICAN LAUNDRY PRESS CO.
and its successor corporation,
McGRAW-EDISON COMPANY,

Petitioners,

vs.

OK NYO REXRODE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BYRON L. GREGORY
Counsel for Petitioner

Of Counsel:

STEVEN H. HOEFT
ROGER W. WENTHE
McDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000

CHAS. P. YOUNG CHICAGO, INC.

QUESTIONS PRESENTED FOR REVIEW

The petitioners, American Laundry Press Co. and its successor corporation, McGraw-Edison Company, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 12, 1982, as modified on April 22, 1982 on the following issues:

1. Whether the Court of Appeals erred by determining the admissibility of evidence in this diversity action under state law, rather than under the Federal Rules of Evidence.

2. Whether evidence of the compliance of the petitioners' product with an industry standard was properly excluded by the Court of Appeals from this strict products liability action.

3. Whether the prejudicial impact on the jury of the respondent's counsel's repeated references to irrelevant personal injury claims against the petitioners was merely a harmless error as the Court of Appeals concluded.

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
Reasons for Granting the Petition	5
Conclusion	16
Appendix	
Opinions of Courts Below	
Rexrode, et al. v. *American Laundry Press Co., et al.*, Order of Judgment on Jury Verdict, No. 78-4207 (D.Kan. June 30, 1980)	A-1
Rexrode, et al., v. *American Laundry Press Co., et al.*, Slip Opinion, No. 80-2217 (10th Cir. Mar. 12, 1982)	A-2
Rexrode, et al. v. *American Laundry Press Co., et al.*, 674 F.2d 826 (10th Cir. Apr. 22, 1982)	A-17
Excerpt from Transcript of Record	
Transcript of Proceedings, Afternoon Session, Thursday, June 24, 1980, United States District Court for the District of Kansas: Cross-examination of Mr. Hanson by Mr. Levy	A-33

TABLE OF AUTHORITIES

CASES	PAGE
American Employers Insurance Co. v. *Carney*, 391 F.2d 551 (5th Cir. 1968)	10
Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938)	9, 12
Fabian v. *E. W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978)	7
Hanna v. *Plumer*, 380 U.S. 460 (1965)	9, 13
In re Air Crash Disaster, 526 F.Supp. 226 (N.D.Ill. 1981)	9
Johnson v. *William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950 (5th Cir. 1979), *modified*, 609 F.2d 820 (5th Cir. 1980)	8, 9
Jones v. *Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976)	4, 10, 12
McKinnon v. *Skil Corp.*, 638 F.2d 270 (1st Cir. 1981)	7, 9
Murphy v. *L&J Press Corp.*, 558 F.2d 407 (8th Cir. 1977)	6, 8, 9
O'Rear v. *Fruehauf Corp.*, 554 F.2d 1304 (5th Cir. 1977)	15
Pollard v. *Metropolitan Life Insurance Co.*, 598 F.2d 1284 (3d. Cir.), *cert. denied*, 444 U.S. 917 (1979)	8, 9
Rabon v. *Automatic Fasteners, Inc.*, 672 F.2d 1231 (5th Cir. 1982)	8
Stonehocker v. *General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978)	7, 8, 9

CONSTITUTION	
U.S. Const. art. III	5
U.S. Const. art. VI	5

STATUTES	
Fed. R. Evid. 401	6
Fed. R. Evid. 402	6
Fed. R. Evid. 501	10
Fed. R. Evid. 1101	10
28 U.S.C. § 1254(1) (1976)	1

page

28 U.S.C. § 2072 (1976) 5

Pub. L. No. 93-959, 88 Stat. 1926 5

OTHER AUTHORITIES

Administrative Office of the United States Courts, Annual Report 218 (1975) 13

Administrative Office of the United States Courts, Annual Report 67 (1981) 13

F. Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis*, in *The Law as Literature* 118 (E. London ed. 1960) 15

10 Moore's Federal Practice §§ 35, 57 ..... 5, 9

In The

Supreme Court of the United States

October Term, 1982

No.

AMERICAN LAUNDRY PRESS CO.
and its successor corporation,
McGRAW-EDISON COMPANY,

Petitioners,

vs.

OK NYO REXRODE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The judgment of the District Court on the jury's verdict is reproduced in the Appendix at A-1. The original opinion of the Court of Appeals is reproduced in the Appendix at A-2; the modified opinion of the Court of Appeals is reported at 674 F.2d 826 and is reproduced in the Appendix at A-17.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 12, 1982. A timely petition for rehearing was denied on April 22, 1982. This petition is being timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATEMENT OF THE CASE

This is an action arising out of injuries suffered by the respondent while she was operating a laundry press which had been manufactured by the petitioner American Laundry Press Company. While this petitioner had sold the laundry press to the United States government in 1959 and it had been operated without incident from 1959 to 1977, the respondent nevertheless claimed that some unknown defect of the press caused the head of the press to close on her hand while she was operating it in 1977. She brought this action against the petitioners to recover for her injuries based on theories of negligence, strict products liability and breach of warranty.[1]

Through pretrial discovery, the respondent's counsel was informed of the identity of other individuals who had made claims that they were injured while operating other laundry or dry cleaning presses which the petitioners had manufactured. Since many of these claims involved presses which were substantially dissimilar to the subject laundry press, the petitioners sought through an *in limine* motion to bar the respondent's counsel from making any reference to these irrelevant claims before the jury. The district court granted that motion, in part, and limited the respondent's counsel to cross-examination of witnesses about claims against the petitioner of which they had personal knowledge relating to presses similar to that which respondent had operated. Nevertheless, throughout the trial, the respondent's counsel intentionally referred to these irrelevant claims during his cross-examination of the petitioners' witnesses with state-

[1] In addition to the parties listed in the caption to this petition, the United States participated in the district court as an intervenor to recover on the statutory subrogation rights arising from its payment of plaintiff's medical fees. The United States did not participate in the appeal. Petitioner American Laundry Press Co. no longer exists, and petitioner McGraw-Edison Co. has no domestic affiliates other than wholly-owned subsidiaries.

ments as graphic as "the press head was caused suddenly and without warning to close upon the left hand of the plaintiff, thereby causing severe and permanent injuries to his person, including and not limited to the partial amputation of his left hand." (A-33).

At trial the respondent offered no reasonable explanation about why the press head closed on her hand. Her claim rested principally on her contention that the laundry press was defective because its design did not conform to prevailing industry standards and government regulations. To support that contention, the respondent offered as evidence a standard for laundry presses which had been adopted in 1941 by the American National Standards Institute (ANSI) and an Occupational Safety and Health Act (OSHA) regulation regarding laundry presses, which had been proposed in 1972 but was never adopted, to which the subject press allegedly failed to conform. The district court admitted both the 1941 ANSI standard and the 1972 OSHA proposal into evidence.

However, the district court excluded from evidence the ANSI standard for laundry presses which had been adopted in 1972 to which the subject press conformed, even though this standard was the successor to the 1941 ANSI standard upon which the respondent relied. This excluded ANSI standard had been offered by the petitioners to demonstrate that the respondent's interpretation of the 1941 ANSI standard was incorrect and to show that the subject press complied with industry standards at the time of the occurrence.

On June 30, 1980, a verdict in the amount of $750,000 was returned in favor of the respondent and judgment was entered accordingly. The petitioners' alternative motions for a new trial and for judgment notwithstanding the verdict were denied. The petitioners appealed the entry of the judgment to the United States Court of Appeals for the Tenth Circuit.

On March 12, 1982, the Court of Appeals affirmed the judgment in favor of the respondent. With respect to the

exclusion from evidence of the 1972 ANSI standard, the Court of Appeals first held that state law, not the Federal Rules of Evidence, governed the admissibility of the standard. (A-11 n.17). The Court of Appeals next decided that no Kansas state court had considered whether evidence of conformance to industry standards was admissible in a strict products liability action, ignoring or overlooking the fact that the Kansas Supreme Court had held in *Jones* v. *Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976), that conformance to industry standards was prima facie evidence that a product was not defective. (A-12). The Court of Appeals alternatively concluded that the 1972 ANSI standard had been properly excluded on the issue of feasibility of alternate designs because it was irrelevant and possibly confusing. (A-14).

With respect to the effect of the respondent's counsel's repeated reference to irrelevant personal injury claims against the petitioners, the Court of Appeals held that these were harmless errors which were cured by the trial court's instruction to the jury that the remarks of counsel are not evidence.

The petitioners petitioned for a rehearing because, among other reasons, the Court of Appeals mischaracterized the Kansas Supreme Court's decision in *Jones* v. *Hittle*, *supra*, as involving simply a negligence case, not a strict product liability case. The Court of Appeals denied the petition but modified its opinion with a cosmetic change in its characterization of *Jones* v. *Hittle*. (A-27).

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE FEDERAL RULES OF EVIDENCE OR STATE LAW CONTROLS THE ADMISSIBILITY OF EVIDENCE IN A DIVERSITY ACTION.

The Court of Appeals concluded that the 1972 ANSI standard was properly excluded from evidence under Kansas law. The Court of Appeals' misinterpretation of Kansas law is discussed below. However, regardless of the admissibility of industry standards under the law of Kansas, the 1972 ANSI standard should have been admitted into evidence under the governing Federal Rules of Evidence. The Court of Appeals' unwillingness to apply the Federal Rules to this evidentiary issue is contrary to the supremacy clause, U.S. Const. art. VI. The holding that the admissibility of such evidence is controlled by state law also conflicts with decisions of the United States Court of Appeals for the Third, Fourth, Fifth and Eighth Circuits holding that the Federal Rules of Evidence, not the law of the state in which the federal court sits, control the admissibility of relevant evidence in a diversity action.

The Federal Rules of Evidence were adopted by Congressional statute, Pub.L. No. 93-959, 88 Stat. 1926, rather than being issued under the Rules Enabling Act of 1934, 28 U.S.C. § 2072 (1976), the authority under which this Court promulgated the Federal Rules of Civil Procedure. 10 Moore's Federal Practice § 35. The authority for the Rules of Evidence is Article III of the United States Constitution, which empowers Congress to "ordain and establish" the lower federal courts and procedures governing them. 10 Moore's Federal Practice § 57. The applicability and scope of the Federal Rules of Evidence in a diversity action are governed by wholly different considerations than those that apply to rules issued under the Rules Enabling Act. The reasonable exercise of Congress' power by the adoption of the Rules of Evidence supersedes any inconsistent rule of evidence under state law, without regard to whether it is

"substantive" or "procedural." The boundaries of this power, which have not yet been addressed by this Court, must encompass at the least the area of admissibility in the federal courts of evidence that is undisputedly relevant. Therefore, the Court of Appeals in this case committed reversible error when it applied the rule it presumed the Kansas courts would follow rather than following the mandate of Section 402 of the Federal Rules of Evidence that all relevant evidence not excluded by other statutes or rules is admissible.

An industry standard which was in effect at the time of the occurrence and which was the successor to the industry standard in effect at the time the product was manufactured is certainly relevant under Rule 401 of the Federal Rules of Evidence to the respondent's claim that the product was defective and unreasonably dangerous. *See Murphy* v. *L&J Press Corp.*, 558 F.2d 407 (8th Cir. 1977). Since compliance with the standard was relevant and not otherwise excluded by a special statute or rule, the standard and evidence of compliance with it were also admissible under Rule 402 of the Federal Rules of Evidence. Thus, if the Federal Rules of Evidence govern the admissibility of evidence in a diversity action, then the 1972 ANSI standard was improperly excluded by the courts below.

The improper exclusion of the 1972 ANSI standard had two significant adverse effects on the petitioners. *First*, the petitioners were denied the opportunity to refute the respondent's interpretation of the 1941 ANSI standard with the most persuasive evidence available: the successor standard. *Second*, the evidence before the jury conveyed the erroneous impression that the petitioners' product did not comply with industry standards when, in fact, the laundry press did comply with the industry standard in effect at the time of the occurrence.

In making the significant determination that the 1972 ANSI standard was not admissible, the Court of Appeals did not critically evaluate the impact of the Federal Rules of Evidence in its choice of law. Rather, the Court of Appeals

supported its selection of state law solely by reference to its own decision in *Fabian* v. *E. W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978). The *Fabian* decision is noteworthy only because it is as devoid of supremacy clause analysis as is the Court of Appeals' opinion in the instant case. In neither opinion did the court below explain why it had chosen to ignore the Federal Rules of Evidence in a diversity action.[2]

On the other hand, the circuit courts which have acknowledged the existence and validity of the Federal Rules of Evidence have held that the admissibility of evidence in a diversity action must be determined by those rules. In *Stonehocker* v. *General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978), the district court had excluded from evidence federal safety standards regarding automobile design because the standards were adopted after both the manufacture of the subject automobile and the occurrence. The Court of Appeals reversed that ruling and held that the federal safety standards were admissible under the Federal Rules of Evidence. The Fourth Circuit first noted the possible tension between the Federal Rules of Evidence and this Court's decision in *Erie, supra*, but concluded that it did not have to resolve that tension because it found no state law which controlled the admissibility of such a government regulation. In the absence of state law, the Court of Appeals tested the admissibility of the safety standards under the Federal Rules of Evidence and found them to be admissible, even though the safety standards were adopted after the occurrence in question.

The decision of the Fourth Circuit in *Stonehocker, supra*, conflicts with the decision of the court below on two impor-

---

[2]The court below is not alone in this regard. The Court of Appeals for the First Circuit held in *McKinnon* v. *Skil Corp.*, 638 F.2d 270 (1st Cir. 1981), that the admissibility of an OSHA safety regulation is to be determined under state law in a products liability action. As in this case, the court in *McKinnon* simply ignored the Federal Rules of Evidence without explanation.

tant points. *First*, in the absence of controlling state law, the court in *Stonehocker* measured the admissibility of the standards against the Federal Rules of Evidence, whereas the court below measured the admissibility of the standards against what it thought state law would be. *Second*, the court in *Stonehocker* found standards adopted after the occurrence to be relevant and admissible, whereas the court below found standards adopted before the occurrence to be irrelevant and inadmissible.

The supremacy of the Federal Rules of Evidence was also addressed by the Fifth Circuit's decision in *Johnson* v. *William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950 (5th Cir. 1979), *modified*, 609 F.2d 820, 821 (5th Cir. 1980), wherein the court held that in diversity cases "the Federal Rules of Evidence govern the admissibility of evidence in the federal courts." The plaintiff in *Johnson* sought to have numerous government codes and industry standards admitted into evidence. The district court excluded the evidence based upon the applicable state law. The Court of Appeals found the district court's reliance on state law to be improper and held that the Federal Rules of Evidence, not state law, controlled the admissibility of those codes and standards. The Fifth Circuit reaffirmed its decision in *Rabon* v. *Automatic Fasteners, Inc.*, 627 F.2d 1231 (5th Cir. 1982), wherein it held that the Federal Rules of Evidence govern the admissibility of OSHA regulations in a diversity action.

Similarly, in *Murphy* v. *L&J Press Corp.*, 558 F.2d 407 (8th Cir. 1977), the Court of Appeals for the Eighth Circuit held in a strict products liability diversity action involving a punch press that the admissibility of ANSI standards and OSHA regulations were to be determined under Rule 402 of the Federal Rules of Evidence. In *Pollard* v. *Metropolitan Life Insurance Co.*, 598 F.2d 1284 (3d Cir.), *cert. denied*, 444 U.S. 917 (1979), the Court of Appeals for the Third Circuit held that in a diversity action to recover benefits under a life insurance policy, the Federal Rules of Evidence govern the admissibility of a decedent's death certificate, coroner's certificate, and

pathologist's report. *See also In re Air Crash Disaster*, 526 F. Supp. 226 (N.D. Ill. 1981). The rulings of the circuit courts in *Stonehocker, Johnson, Murphy*, and *Pollard* are in conflict with the First and Tenth Circuits' decisions holding that the admissibility of evidence of compliance with industry standards in a diversity action is to be determined under state law.[3]

The rulings of the Third, Fourth, Fifth, and Eighth Circuits discussed above are based on those courts' interpretation of the Court's decision in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). As we have shown above, analysis under *Erie* appears to be unnecessary in light of the effect of the supremacy clause on the applicability of the statutory Rules of Evidence. Even if the analysis followed by the Court in *Erie* and in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), were applicable to whether the Federal Rules of Evidence govern the admissibility of evidence of a product's compliance with industry standards, the same result would obtain. The issue as to whether such evidence is admissible can only be classified as one of "procedure." 10 Moore's Federal Practice § 57, at 88. Accordingly, even if the distinction drawn by the Rules Enabling Act of 1934 were germane, the Federal Rules of Evidence would govern the admissibility of this type of evidence.

The conflict between the circuits reflected in *Stonehocker, Johnson, Murphy*, and *Pollard* on one side and the decision of the court below and *Skil* on the other side as to the role to be played by the Federal Rules of Evidence in a diversity action requires that a writ of certiorari issue to resolve the conflict. Although the Federal Rules of Evidence expressly left

[3]To the extent the Court of Appeals' decision is based on its alternative ground that the 1972 ANSI standard was excludable under Fed. R. Evid. 403 on the issue of feasibility of alternate designs, it is in further conflict with the decisions in *Stonehocker, Johnson*, and *Murphy* and with its own ruling that a 1972 OSHA standard that was proposed but never adopted was admissible.

certain evidentiary questions to be resolved under state law (*e.g.*, the existence of a privilege, see Fed. R. Evid. 501), Congress certainly intended that the Federal Rules of Evidence would be controlling in all other instances. See Rule 1101 of the Federal Rules of Evidence. The plain objective of the statute is to create a uniform code of evidence to be used in the federal courts. The extent to which that uniform code can be enforced should be defined by this Court so that evidentiary questions such as the one presented here are not decided inconsistently by the district and circuit courts.

II. THE COURT OF APPEALS' INTERPRETATION OF KANSAS LAW DISREGARDS THE CONTROLLING DECISION OF THE KANSAS SUPREME COURT

Assuming, *arguendo*, that the Court of Appeals correctly concluded that the admissibility of the 1972 ANSI standard was governed entirely by reference to state law, the court was then obligated under *Erie* to apply the law of Kansas, even if it disagreed with the result. *American Employers Insurance Co.* v. *Carney*, 391 F.2d 551 (5th Cir. 1968). The Court of Appeals disregarded that obligation here.

The issue of the admissibility of industry standards in a strict products liability action was addressed by the Kansas Supreme Court in *Jones* v. *Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976). The subject of *Jones* v. *Hittle* was a gas explosion. The plaintiffs in *Jones* v. *Hittle* asserted liability against the defendant on four separate theories; negligence, strict liability in tort, breach of implied warranty, and absolute liability.

Under the strict products liability claim, the plaintiffs claimed the product, propane gas, was not sufficiently odorized and that the absence of odorization "constitutes a defect in the product so as to impose strict liability in tort...." *Id.* at 630, 549 P.2d at 1388. The defendants showed that the gas had been odorized to the level required by a state regulation. The Kansas Supreme Court was thus

required to determine the relevance of defendants' products' compliance with a state regulation to the plaintiffs' strict products liability claim.

The Kansas Supreme Court began its analysis of this issue by stating:

> "Although this court has not dealt with compliance with statutes and regulations as showing due care (*or lack of defect*), we have recently considered compliance with industry standards as bearing on the same elements."

Id. at 632, 549 P.2d at 1389 (emphasis added). After reviewing its prior decision establishing that compliance with industry standards is evidence of due care in a design negligence case, the Kansas Supreme Court held:

> "We think the same rule should apply to the standard set by the legislature (or by regulations having the effect of law) as to those set by an industry. *Compliance is evidence* of due care and *that the conforming product is not defective,* and may be conclusive in the absence of a showing of special circumstances."

Id. at 632, 549 P.2d 1390 (emphasis added). The Kansas Supreme Court then affirmed the summary judgment entered against the plaintiff on the strict liability theory.

Despite this holding by the Kansas Supreme Court of the relevance of a product's compliance with industry standards and government regulations to a strict products liability claim, the Court of Appeals stated in its first opinion that "no Kansas Court to date has addressed this issue [of the admissibility of industry standards in a strict liability case]." (A-11 n.17). Because it apparently found no state law on point, the Court of Appeals conducted its own analysis of the law of products liability and concluded that "the issue of manufacturer compliance with industry standards is irrelevant to strict liability analysis." (A-12).

The Court of Appeals attempted to distinguish the Kansas Supreme Court's decision in *Jones* v. *Hittle* by stating that the claims raised therein "were founded on *negligence* and not *strict liability.*" (A-12) (emphasis in original). That distinction is spurious. In *Jones* v. *Hittle*, the plaintiff had asserted a strict products liability claim, the Kansas Supreme Court affirmed the entry of summary judgment on that claim, and the Kansas Supreme Court expressly held: "Compliance [with industry or government standards] is evidence . . . that the conforming product is not defective, and may be conclusive in the absence of a showing of special circumstances." 219 Kan. at 632, 549 P.2d at 1390. Thus, in its first opinion, the court below misconstrued *Jones* v. *Hittle*; the only question remaining was whether the misconstruction was inadvertent or intentional.

When the misconstruction was noted in the petition for rehearing, the Court of Appeals modified its opinion and acknowledged that *Jones* v. *Hittle* involved a strict products liability claim. However, the Court of Appeals did not alter its holding that compliance with industry standards is irrelevant to a strict products liability claim under Kansas law. (A-27). This superficial response to the petition for hearing makes it obvious that the Court of Appeals intentionally misconstrued *Jones* v. *Hittle*.

There is only one plausible explanation for the intransigence of the Court of Appeals on this issue: it does not agree with the willingness of the Kansas Supreme Court to admit evidence of a product's compliance with industry standards. Yet, under *Erie*, a federal court has no right to judge the wisdom of state law. It must apply the state law as it exists. Evidence of the compliance of petitioner's product with the 1972 ANSI standard was admissible under Kansas law as expressed in *Jones* v. *Hittle* and the court below violated *Erie* by ignoring that state supreme court decision.

This Court's decision in *Erie* had two principal objectives: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, *supra*,

380 U.S. at 468. The decision below, if it is permitted to stand, will thwart both objectives. It encourages forum shopping because a plaintiff who is claiming that a product is defective will file in federal court if the product complies with an industry standard but will file in state court if the product does not comply, so as to benefit from the different interpretations of the state law evidentiary standard that will be applied. It leads to the inequitable administration of the laws because in light of the Court of Appeals' disdain for both the Federal Rules of Evidence and Kansas law, the evidence of compliance of a product with industry standards is admissible in other federal courts and in Kansas state courts, but not in a federal court in Kansas. There is no rational basis for such disparate treatment.

The Court of Appeals' misconstruction of state law and the conflict among the lower federal courts about the admissibility of evidence in a strict products liability action reflects the burgeoning products liability litigation in the federal court system. According to the Annual Reports of the Director of the Administrative Office of the United States Courts, the number of product liability suits filed in the district courts has mushroomed from 1,579 in 1974 to 9,071 in the year ending June 30, 1981. Administrative Office of the United States Courts, Annual Report 218 (1975); Administrative Office of the United States Courts, Annual Report 67 (1981). This growth has been fueled, in part, by opinions such as the decision of the Court of Appeals which induce plaintiffs to file suit in a district court in an attempt to obtain a more favorable construction of state law than they would receive in state court.

In light of the volume of products liability litigation in the federal courts and the adoption of the Federal Rules of Evidence, it is important for this Court to define the role of the federal courts in such litigation. If there is to be a federal common law of products liability, as the Court of Appeals' decision implies, then this Court should establish the elements of that tort. If state law provides the rules of

evidence for such claims, as the decision states, then the lower federal courts must be reminded of their obligation to adhere to state law as expressed by the state's highest appellate panel. Finally, if the Federal Rules of Evidence are applicable to such claims, then this Court must establish the evidentiary guidelines for those claims.

III. THE DECISION BELOW IS ANTITHETICAL TO THE FAIR AND ORDERLY ADMINISTRATION OF JUSTICE.

This case centered on an occurrence for which there was no plausible explanation, other than the routine activation of the press, which the respondent denied. Consequently, the jury was presented with two seemingly innocent parties—the injured respondent and the corporate manufacturer. The respondent's counsel upset this delicate balance by referring in the presence of the jury during cross-examination to other claims for serious personal injuries which had been made against the petitioners. While these other claims were irrelevant, a fact of which the respondent's counsel was aware before he made the comments, the jury was left with the understanding that the instant case was simply one of a series of such occurrences. The presumption of innocence to which the petitioners were entitled had been levelled.

The Court of Appeals held that the remarks by the respondent's counsel were, at most, harmless error. That holding was premised on the Court of Appeals' conclusion that the respondent's counsel acted in good faith and its belief that the district court's instruction to the jury that the remarks of counsel were not evidence cured any error. However, the respondent's counsel did not act in good faith; even the respondent conceded that several of the claims to which her counsel referred during trial were irrelevant. Moreover, the good faith of the respondent's counsel is irrelevant because the prejudicial impact of his remarks on the jury remains unchanged regardless of his motives.

The district court's instruction to the jury was equally unavailing. As the court recognized in *O'Rear* v. *Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977):

> "[T]he cleansing effect of the cautionary instructions in this case is dubious for, as the trial judge himself observed during the trial, '[y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.' "

This candid acknowledgment of the limited usefulness of an instruction to disregard counsel's comments parallels an observation made by Justice Frankfurter:

> "Unfortunately the passion and prejudice systematically instilled during the course of a trial cannot be exorcised by the general, placid language of a charge after the mischief is done. (Every experienced lawyer knows that it is idle to ask jurors to dismiss from their memory what has been deposited in their feelings.)"

F. Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis*, in *The Law as Literature* 118 (E. London ed. 1960). Where, as here, there is a distinct pattern of improper conduct which prejudices a jury, the simple instruction that remarks of counsel are not evidence offers no relief to the disadvantaged party.

Thus, neither counsel's intent nor the jury instruction could negate the feelings aroused by counsel's remarks. The petitioners were victimized by those feelings. It is fundamentally unfair to permit such conduct to taint the deliberations of a jury. The unwillingness of the court below to remedy the problem was inexcusable.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

BYRON L. GREGORY
Counsel for Petitioners

OF COUNSEL:

STEVEN H. HOEFT
ROGER W. WENTHE
MCDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000